No. 16485

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN ALEXANDER RYAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

Statement of Jurisdiction.

An Information in twenty-one counts was filed against appellant on October 3, 1958 and amended during trial. Appellant pleaded not guilty to the Information on November 10, 1958. A jury trial of the Information commenced on January 12, 1959, which was concluded on January 26, 1959 by a verdict of guilty on Counts 2, 3, 4, 7, 8 and 18. These counts were the only ones submitted to the jury, the others being dismissed prior to submission of the case to the jury.

On January 30, 1959 judgment was entered, the appellant being sentenced on each of the aforesaid counts to be committed to the custody of the Attorney General for a period of one year, to run concurrently. Appellant also was fined $1,000 upon Count 2, $4,000 upon Count 3 and $2,000 upon each of Counts 4, 7 and 8, or a total

fine of $11,000. A timely notice of appeal was filed on February 2, 1959, and appellant is at liberty on bail pending disposition of the appeal.

The District Court had jurisdiction under the provisions of 18 U. S. C., Sections 202 and 3231. This Court has jurisdiction under the provisions of 28 U. S. C., Section 1291.

Statute Involved.

Construction and interpretation of 18 U. S. C. Section 220 is one of the issues in the appeal. Section 220 reads as follows:

> "Whoever, being an officer, director, employee, agent, or attorney of any bank, the deposits of which are insured by the Federal Deposit Insurance Corporation, of a Federal intermediate credit bank, or of a National Agricultural Credit Corporation, except as provided by law, stipulates for or receives or consents or agrees to receive any fee, commission, gift, or thing of value, from any person, firm, or corporation, for procuring or endeavoring to procure for such person, firm, or corporation, or for any other person, firm, or corporation, from any such bank or corporation, any loan or extension or renewal of loan or substitution of security, or the purchase or discount or acceptance of any paper, note, draft, check, or bill of exchange by any such bank or corporation, shall be fined not more than $5,000 or imprisoned not more than one year or both."

The sole points on appeal are the appropriateness of two instructions to the jury and not the sufficiency of the evidence. Nevertheless, appellee will set forth a brief résumé of the facts below because an understanding of

the case may be helpful to the Court and because some nineteen pages of appellant's Brief concerned a statement or analysis of the evidence. In its summary, appellee will take the construction of the evidence most favorable to it, together with all available inferences, not only out of a natural disposition to do so, but because such is the rule of law.

Summary of Evidence.

I. Counts, Four, Seven and Eight.

These counts pertain to three payments of $1500 each by Jack Ewins, as represented by three checks, Exhibits 38, 39 and 40 for loans to the Cahuenga Development Corporation.

Ewins testified that he came to appellant for a loan, but that Ryan insisted first upon a payment of $6500, complaining that Ewins had not paid him with respect to a previous loan for Arlington Building Corporation [R. T. 100].* According to Ewins, Ryan defined the issue rather bluntly:

> "[I]f I didn't want to work with him, . . . I needn't come to see him for a loan." [R. T. 100].

Because of Ewins' need for the loan and Ryan's position as a "kingpin," Ewins promised to pay $4500, which Ryan graciously conceded could be paid in three installments out of the Loan proceeds [R. T. 116]. Three checks for $1500 each, Exhibits 38, 39 and 40, payable to C. M. Owens, thus were made out by Lucretia Ewins and mailed to appellant's residence [R. T. 110-111, 154, 157].

Catherine M. Owen, a resident of Arcata, California, and longtime friend of appellant [R. T. 426], received

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*"R. T." will refer to the Reporter's Transcript of Proceedings.

Exhibit 38 accompanied by a desk pad memorandum of appellant [Ex. 67-A], which stated:

> "Dear Caty, First Installment $1500. Two more to follow. JAR" [R. T. 436, 819].

A letter from appellant's wife [Ex. 68-B] transmitted the second $1500 check [Ex. 39; R. T. 440-441]. The third check [Ex. 40] was endorsed by Mrs. Owen on December 27, 1954, and was given by her to the Valley National Bank as a portion of the payment for a cashier's check which, together with other checks, was given to appellant at that time and place [R. T. 446-447, 780].

II. Counts Two and Three.

These counts involve, respectively, payment of $700 and $3725 to appellant for loans made to the Arlington Builders Corporation.

On numerous occasions, appellant stated to shareholders of the Corporation that he was very influential in getting loans through the bank, he was entitled to extra compensation as a result, and if Arlington would continue to take care of him on payments, he would continue to render valuable services to the Corporation [R. T. 239, 257, 121, 124]. Finally appellant Ryan became more specific, telling Julius White, secretary of the Corporation, that he required money for having put their loan through [R. T. 242-244]. He told Wendell P. Harding, that a "finder's fee" could be paid him; when Harding made it clear that no cash payments would be made, Ryan said he would supply the name of a party to whom a check could be made payable [R. T. 275]. Ryan then instructed White that the payee of the check should be "TruBilt Homes," to note on the check that it was for "finder's fee on real estate" and to mail it to C. M. Owen in

Arcata, California [R. T. 244-247]. Pursuant to this arrangement, Mrs. Owen received Exhibit 44, a $3725 check drawn by Arlington Builders. The proceeds of this check, along with the $4500 Ewins paid for Ryan's benefit, were returned to Ryan on December 27, 1954 at the Valley National Bank in the form of a cashier's check and other checks, which were deposited to an account for appellant's children at the Pasadena Savings & Loan Association [R. T. 797-798].

On another occasion, Ryan stated that he needed money from Arlington Builders because he was taking a trip to Hawaii [R. T. 249-250]. This hint resulted in a $700 payment by shareholders of Arlington one evening at Ryan's home [R. T. 252, 273, 292], which is the basis of Count Two.

III. Count Eighteen.

This count involves the payment of $1687 to appellant by the Triangle Development Corporation for a loan obtained through Ryan from the Bank of America.

Two or three months after the Corporation had obtained the loan, appellant proceeded to the office of Ray Connors, a one-third shareholder of the Corporation, in order to discuss Ryan's compensation for having made the loan [R. T. 174]. Connors mentioned the reluctance of his partner Dohn to enter into a transaction so odious, but Ryan won his point by telling Connors that Dohn

> "should be made aware of the importance or contribution he [Ryan] could make in this regard." [R. T. 176].

The arrangement was put upon a "business-like" basis of one-half of one percent of the face value of the loan, which arrangement was "acceptable" to appellant [R. T. 176].

Appellant instructed Connors to use the name of Ray E. Viers as the payee upon Ryan's compensation check [R. T. 179]. As a result, Exhibit 41, a check for $1687, was drawn to Viers' favor [R. T. 178-179] which was then cashed by Viers who gave the proceeds to Ryan's wife [R. T. 219-220].

IV. Appellant's Defense.

In his defense, Ryan admitted receipt of the $700 but denied it was received for any illegal purpose [R. T. 661-662]. Appellant Ryan denied having anything to do with the three $1500 checks from Ewins, the $3725 check from Arlington Builders or the $1687 check from Triangle Development [R. T. 664-665, 680, 690-692]. In addition, appellant denied being at the Valley National Bank on December 27, 1954 with Mrs. Owens, and denied receiving Exhibit 81, a $1000 check from Eugene Shidler, a general contractor [R. T. 796].

In rebuttal, Les Allen, President of the Valley National Bank, testified that appellant was at such bank with Mrs. Owen on December 27, 1954 [R. T. 780]. Shidler testified he handed Exhibit 81, the $1000 check, to Ryan [R. T. 789-790], and Mrs. Owens testified that this check was transmitted to her by a memorandum in appellant's handwriting [Ex. 87-B] enclosed in a letter written by Mrs. Ryan [R. T. 773].

Apparently the jury gave appellant's testimony the credence it deserved.

ARGUMENT.

The Jury Was Instructed Correctly That 18 U. S. C. §220 Was Violated by Receipt of Money Subsequent to a Loan.

Although the record [R. T. 933] discloses that no exception was taken to the following Instruction, appellant claims (Br. pp. 23-24) that the giving of this Instruction was error:

> "You will have observed that the statute from which I have just quoted is clearly so worded that it does not limit its applicability to those instances in which an officer or employee of a bank, at a time before the procuring of or the endeavoring to procure, a loan in question, stipulates for or receives or consents or agrees to receive any fee, commission, gift, or thing of value from any person, firm or corporation, for procuring or endeavoring to procure such loan. What is vital and essential to guilt is that, in point of fact, the stipulation for, or receipt of, or consent or agreement to receive, any fee, commission, gift or thing of value from any person, firm or corporation actually be for the procuring of, or the endeavoring to procure, a loan from the bank either for such person, firm or corporation, or for any other person, firm or corporation. If that be true, then the conduct of the officer or employee involved is in violation of the statute quoted, even though the loan in question be made or approved before the date of such stipulation for, or receipt, or consent or agreement to receive the fee, commission, gift or other thing of value." [R. T. 897-898].

Appellant argues that the error of the Instruction lies in the fact that the applicable statute, 18 U. S. C. Section 220, pertains only to situations where a fee or gift is received, or an agreement to so receive is made, prior to or during the procuring of the bank loan (Br. p. 24).

It may be of interest to this Court to read District Judge Delehant's comments regarding the instant problem. At the close of the plaintiff's evidence, the Court ruled:

> "Now, as to the other counts at which the motion is aimed, I am aware, and have been as the evidence has been presented, of the contention which the defendant makes in a variety of ways.
>
> First and with no little point, that in most, if not all—although I think not all—of the instances the loans mentioned were fait accompli before there was any changing hands of money.
>
> I am of the opinion, after careful and repeated reading of the statute, that that does not defeat the prosecution. We are not dealing here with any question of the nicety and technicality of consideration and the like, that isn't at issue. The recognition either of an existing and subsisting engagement to pay, or, as counsel for the Government has said, the payment of an outright gratuity for services rendered, without any obligation or commitment, would, as I believe, if the matter be referrable to the procurement or endeavoring to procure a loan, be violative of the statute." [R. T. 573].

The District Court again passed upon this question in determining a Rule 29(b) motion. Although appellant has quoted a portion of the Court's observations, it might

be more fair to Judge Delehant to have his entire thought set forth:

> "Now, if I be mistaken in my conclusions that once an officer or employee of a banking institution, whose deposits are secured by the Fidelity Deposit Insurance Corporation, has procured or caused the procurement of a loan by the bank to an individual, a firm or a corporation, the payment to him thereafter or the arrangement for payment to him thereafter of any sum of money—and we are dealing with money here, and I do not overlook the fact that the statute is aimed at other things—is not denounced by the statute, even though the payment made or contemplated be a reward for the action of the officer or the employee, then I was wrong in submitting the case to the jury.
>
> But throughout the trial I have been persuaded and am persuaded that such a view of the statute is completely inadmissible and had been so inadmissible throughout. If such an amendment of the statute were to be made judicially, it would have to be made by appellate authority, and not by a trial judge. I feel constrained to administer the statute as it is drawn and as drawn I believe it denounces each transaction here before me, on the basis of the evidence submitted by the Government, which now, after being credited by the jury, seems to me to have risen to the stature of the facts.
>
> Under all of the circumstances and in the light of the verdict, I believe that the motion is not well taken as to any one of the six several counts on which the case was submitted to the jury. . . ." [R. T. 958-959].

I.

The Statute Clearly and Unequivocally Proscribes Receipt of Fees for Loans, Whether Before or After a Loan; Hence, Statutory Construction Is Unnecessary.

As stated in *Flora v. United States,* 357 U. S. 63, 65 (1958):

> "In matters of statutory construction the duty of this Court is to give effect to the intent of Congress, and in doing so our first reference is of course to the literal meaning of words employed."

Turning to the words employed in United States Code, Section 220, Title 18, the statute makes subject to punishment any bank officer who

> "receives . . . any fee . . . *for* procuring or endeavoring to procure . . . any loan. . . ." (Emphasis added.)

The preposition "for" in the statute is thought by appellee to be of significance, and is defined by Webster's New Collegiate Dictionary, 2nd Ed. (1953), as being "that in consideration of which, in view of which, or with reference to which, anything is, is done or takes place" and as "indicating the cause, motive, or occasion of an act or condition."

Thus, the literal, unambiguous words of the statute state that it is illegal for a bank officer to take a fee "with reference to" a bank loan. There is not a word used in the statute which indicates that the fee must take place either before or after the loan—hence receipt of a fee for a loan is proscribed whenever payment of the fee takes place.

Appellant, however, argues that the statute reads in the "prospective" (Br. p. 24), and further states that because the past tense is not used, the statute does not prohibit the receipt of post-loan fees (Br. p. 29).

Grammatically, though, the only tense used in the statute is in connection with the verb "receives," which is in the present tense. Apparently appellant considers that the phrase "for procuring or endeavoring to procure . . . any loan . . ." is in the prospective, or future, tense. This cannot be true because the quoted phrase is a gerund phrase, more a noun than a verb, and therefore has no tense. (*Harbrace Handbook of English,* p. 51, 1953.) This can be seen perhaps more easily by way of illustration than by reference to grammar books.

The quoted gerund phrase in the following sentence may be used with a verb of any tense:

> "Procuring or endeavoring to procure a loan" (is) (was) (will be) (has been) (had been) (will have been) declared illegal.

The gerund phrase in the example and in the statute thus will be compatible with whatever verb tense is chosen because it has no tense. Hence, the statute does not read in the "prospective." Instead it punishes one who "receives" a fee for procuring a loan. The crime is complete at the time of receipt as long as the fee was paid "for" procuring a loan. The literal words of the statute clearly state, therefore, that fees "for" loans are prohibited, without reference to whichever takes precedence in time.

The meaning of the words of the statute being clear, the rule is as was stated in *United States v. Standard Brewery,* 251 U. S. 210, 217 (1920):

> "Nothing is better settled than that in the construction of a law its meaning must first be sought

in the language employed. If that be plain, it is the duty of the courts to enforce the law as written, provided it be within the constitutional authority of the legislative body which passed it."

Or, as this Court phrased the question in *N. L. R. B. v. Lewis,* 249 F. 2d 832, 835 (9 Cir. 1957):

"We start the journey, as with all statutes, by examining the literal wording of the section. The language of a statute is the best and most reliable index of its meaning. Where the language is clear and unequivocal it is determinative unless the literal language does not comport with the intent and objectives of the statute viewed as a whole."

II.

Interpretation of the Statute Shows Congressional Intent to Proscribe Post-Loan Fees.

A. Purpose of the Statute Is to Prevent Excess Fees Being Charged the Public.

There is little help in the cases respecting judicial interpretation of Section 220 on the issue herein involved (see *Schooler v. United States,* 231 F. 2d 560 (8 Cir. 1956).) In a civil suit by shareholders of a bank to recover extraordinary fees made by Fleishhacker, the president of the bank, for procuring a loan, this Court in *Fleishhacker v. Blum,* 109 F. 2d 543 (9 Cir. 1940) held:

"It is a settled principle . . . that a bank officer who receives a bonus or other consideration for procuring a loan of the bank's funds commits a breach of trust, and that the consideration so paid belongs to the bank and may be recovered by it.

* * * * * * *

> In the discharge of his high trust the law holds a responsible agent such as Fleishhacker was to standards of probity and fidelity more lofty than those of 'the market place.' These high standards this court is not disposed to whittle down."

In that case, the illegal fees of Fleishhacker were received long after the loans had been procured by him, although Fleishhacker's agreement to receive the fees was made before the loans. Hence, this case is at least some support for the proposition that post-loan fees are illegal. In any event, the facts of the *Fleishhacker* case are on a par with those in Counts Four, Seven and Eight of the instant Indictment, where the agreement to receive $4500 from Jack Ewins was made before the loan and the receipt of the $4500 occurred thereafter [R. T. 100-104].

Although no case to appellee's knowledge has passed upon the precise purpose of Section 220, one case has passed upon a very analogous statute, 18 U. S. C. Section 221, which reads:

> "Whoever, being an officer, director, attorney, or employee of a national farm loan association, a Federal land bank, or a joint-stock bank . . . is a beneficiary of or receives, directly or indirectly, any fee, commission, gift, or other consideration for or in connection with any transaction or business of such association or bank, other than the usual salary or director's fee paid to such officer, director, or employee thereof, and a reasonable fee paid by such association or bank to such officer, director, attorney, or employee for services rendered, shall be fined not more than $5,000 or imprisoned not more than one year, or both."

The similarity of Section 221 to the present Section 220 is apparent. As appellant has observed, however, Section 220 has been amended. The original form of Section 220 was virtually identical with Section 221, as may be observed upon a comparison of the original:

> "Other than the usual salary or director's fee paid to any officer, director, or employee of a member bank and other than a reasonable fee paid by said bank to such officer, director, or employee for services rendered to such bank, no officer, director, employee, or attorney of a member bank shall be a beneficiary of or receive, directly or indirectly, any fee, commission, gift, or other consideration for or in connection with any transaction or business of the bank." (38 Stat. 732.)

The present Section 220 limits prohibition of extraordinary fees to loans and other specified transactions rather than to any business of the bank, but otherwise its purpose seems not to have been changed by the amendment. The purpose of Section 221 was determined in the case of *Speeter v. United States,* 42 F. 2d 937, 941-942 (8 Cir. 1930) to be to prevent gouging of borrowers by bank officials:

> "The act prohibits an officer or employee receiving for services rendered any compensation or consideration other than that paid him directly as salary or fees. It seems fairly clear that it was the purpose of this statute to protect the borrower from any charges in form of commissions or fees charged, levied, or exacted by officers or employees of the bank. . . . [I]t seems fairly clear that the statute is dealing with and refers to the business of the bank with its customers. As to this business, the officers

> and employees are forbidden to receive anything, either from the bank or from anyone else in connection with a transaction between the bank and a third person, by way of compensation or reward, except their regular salary or fees. The statute was intended, we think, to prevent abuses of this sort. . . . [C]learly the statute would cover the receipt by an officer or employee of a commission, fee, or a consideration in addition to his salary or fee due him for any transaction between the bank and its patrons. . . ."

The purpose of Section 221 being to prevent abuses of this sort being perpetrated upon borrowers, it is not unlikely that such also was the purpose of Section 220. That such was the intent of Congress is somewhat buttressed by the avowed purpose of the Federal Reserve Act of 1913, of which Section 220 formed a part; that purpose was said to be, inter alia,

> "to establish a more effective supervision of banking in the United States." (38 Stat. 251.)

If the intent of Congress, even partially, be to prevent the public from being milked of excess loan fees by unscrupulous bankers, then it would seem to be of little importance whether the banker's demand for extra compensation came before or after the loans were made. The evidence in the instant case indicates that construction loans are paid out in installments [R. T. 104, 116], and it is common knowledge that renewals are often sought regarding loans, as are subsequent loans. Thus there would appear to be practical reason enough for a borrower to comply with an extortionate demand by a banker even though the loan already had been approved.

B. Post-Loan Payments to Bankers Tend to Create Improvident Loans.

Appellant argues that since the intent of Congress must have been to eliminate improvident loans (Br. p. 26), a banker's receipt of money subsequent to a completed loan would not influence him; hence, post-loan fees are not proscribed by the statute because they have no tendency to make the banker grant improvident loans. Assuming the premise that the sole intent of Congress regarding Section 220 was to eliminate improvident bank loans, the Government respectfully disagrees with appellant's conclusion that post-loan fees or gifts do not tend towards the creation of such improvident loans.

First, the argument ignores the corrupting tendency of the payment upon subsequent loans. It is almost inconceivable that a banker who had received a payment following one loan to a borrower would not be influenced thereby when the borrower requested a subsequent loan. Appellant answers this (Br. p. 27) by saying that the "crime, if any, would be in connection with the subsequent loan only." This answer assumes the point in issue, *i.e.,* that no crime is committed when a loan, for which a fee or gift is paid, is uninfluenced by the payment. Moreover, the answer forgets that an essential element of Section 220 is that the payment be "for" a loan. In the above example, the procuring of an influenced, subsequent loan would not be a crime because the payment was not *for* that loan, but for the first loan.

Second, the argument ignores the possibility that a banker might be influenced in making a second loan by the thought that a second payment may result. Yet, since the corruption in this example originated with the first payment, it is seen that post-loan payments do tend towards creating influenced, possibly improvident, loans.

Thus Congress, by enacting a statute which plainly forbids all extraordinary fees and gifts, whether before or after the loan, and whether the loan was or was not influenced, has legislated against improvident loans. If Congress had desired, it could have made the "influencing" of the banker's decision upon a loan an element of the crime, as in the bribery statute, 18 U. S. C., Section 202. This statute, a felony, punishes an official who

> "receives any money . . . with intent to have his decision or action . . . influenced thereby. . . ."

An example of legislation with intent to prohibit officials from receiving money in connection with their duties for any reason is 18 U. S. C., Section 1914. This misdemeanor statute punishes an official who

> "receives any salary in connection with his services as such an official . . . from any source other than the Government of the United States. . . ."

The instant misdemeanor statute, Section 220, does not require the element of "influence" and merely prohibits bankers from receiving payments in exchange for procuring loans. Appellee submits that such legislation directly tends to eliminate improvident loans even though the prohibition therein includes post-loan fees or gifts.

C. Congressional Prohibition of "Gifts" as Well as "Fees" and "Commissions" Further Shows Intent to Forbid Post-Loan Payments.

1. Normally, a fee or commission is arrived at as a result of a bargain made between parties. If a banker bargained with a borrower for the payment of a fee, it would seem natural that the banker's decision as to procuring the loan usually would be influenced thereby.

On the other hand, a gift cannot have been as a result of a bargain. It is conceivable that a banker who received a subsequent gift for a completed loan would have been uninfluenced thereby; but since Congress forbids the receipt of a "gift," it should follow therefore that the influencing of a particular loan is not an element of the offense.

2. If a pre-loan payment were made to a banker *for* his procuring a loan, it seems likely that the payment is more in the nature of a fee; likewise, it seems natural that such a payment after the loan was made would be more in the nature of a gift. Since the statute proscribes gifts, it seems likely that Congress intended post-loan payments to be prohibited.

III.
Summary.

Both the literal words of the statute and an analysis of Congressional purpose demonstrate that Section 220 forbids the receipt of post-loan fees. Any other construction of the statute would distort the clearly expressed intent of Congress. As the Supreme Court stated in *Old Colony R. Co. v. Commissioner,* 284 U. S. 552, 560 (1932):

> "The plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover."

Appellant, naturally enough, argues that this is a penal statute and should be construed narrowly. Dealing with a somewhat similar problem of statutory interpretation,

the Supreme Court in *Osaka Shosen Line v. United States,* 300 U. S. 98, 101 (1937), held:

> "To say that the passenger has not been brought to the United States unless the intent was to leave him here, is not to construe the statute but to add an additional and qualifying term to its provisions. This we are not at liberty to do under the guise of construction, because, as this court has so often held, where the words are plain, there is no room for construction. . . .
>
> It is urged that the statute is highly penal in character and should therefore be construed strictly. But the object of all construction, whether of penal or other statutes, is to ascertain the Legislative intent; and in penal statutes, as in those of a different character, 'if the language be clear, it is conclusive.' "

Similarly, *United States v. Rayner,* 302 U. S. 540, 552 (1938) held:

> "We are not unmindful of the salutary rule which requires strict construction of penal statutes. No rule of construction, however, requires that a penal statute be strained and distorted in order to exclude conduct clearly intended to be within its scope—nor does any rule require that the act be given the 'narrowest meaning.' It is sufficient if the words are given their fair meaning in accord with the evident intent of Congress."

It Was Not Plain Error to Instruct the Jury That Actual Procurement of a Loan Was Unnecessary to Guilt.

Appellant urges (Br. pp. 33-36) that the following Instruction to the jury was error:

> ". . . It is not essential to conviction that the plaintiff prove that the defendant did actually procure or endeavor to procure the loan described. Evidence that he did actually procure or endeavor to procure such loan, if and to the extent that you find such evidence to exist, may indeed be considered by you as reflective of the defendant's object and purpose in his acts, if and to the extent that you find he performed any acts. But the defendant is not in this case charged with, or being prosecuted for, the procurement of, or the attempt to procure, any loan from Bank of America National Trust and Savings Association."

I. The Instruction Is Correct.

The statute does not require that a loan be procured or that a banker have endeavored to procure a loan. What is necessary is that the banker receive or agree to receive a fee, commission or gift *as consideration for* procuring or endeavoring to procure a loan. For example, should a banker intend and agree to receive $500 for procuring a loan, but intervening circumstances prevent his procuring the loan, the statute nevertheless would be violated. Thus the Instruction is correct.

II. No Exception Was Taken to the Instruction.

Rule 30, *Federal Rules of Criminal Procedure,* clearly states:

> "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto

before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

After the District Court charged the jury, the following proceedings transpired:

"The Court: The jurors all having withdrawn from the courtroom, and being now beyond the possibility of observing anything which may transpire in the courtroom, the doors of the courtroom being now closed, the court addresses counsel and inquires of counsel whether there be exceptions to the charge, and first addresses counsel for the Government.

Mr. Bevan: No exceptions, your Honor.

The Court: Counsel for the defendant?

Mr. Youngblood: Merely for the record, your Honor, because I believe we have in substance covered this before, but on behalf of the defendant I wish exception noted with respect to the instruction by which the jury was instructed that they need not find that the evidence conforms in the exact amount as to Count Eighteen. Other than that I have no further objection, no further exception." [R. T. 932-933].

III. Appellant Was Not Prejudicial by the Instruction.

No exception to the instant instruction having been taken, it cannot be made the subject of reversal unless it be plain error under Rule 52(b), F. R. Cr. P. To resolve the question of plain error, assuming, *arguendo,* that the Instruction was erroneous, it must be determined whether the appellant was prejudiced by the Instruction. Although the burden in this respect is upon appellant, appellee invites the Court's attention to the following factors.

First, there is no contention made by appellant that the loans for which fees were given were not in fact completed. The evidence clearly showed as to each count that (a) a loan or loans as pleaded in the Information were made and (b) that appellant procured the loan or loans. As to Counts Two and Three, Exhibits 10, 11, 13 and 14 proved that loans were made as pleaded [R. T. 36-37, 401; 36-37, 401; 37, 402; 37-38, 403]. Exhibits 12 and 15 proved that Ryan procured the loans [R. T. 37, 69, 391; 38, 391]. As to Counts Four, Seven and Eight, Exhibit 18 proved that the loan was made [R. T. 70, 404], and Exhibit 17 proved that Ryan procured the loan [R. T. 39, 69, 390]. As to Count Eighteen, Exhibits 33 and 34 proved that the loan was made [R. T. 44, 408; 45, 77, 387], while Exhibit 32 proved that Ryan procured the loan [R. T. 44, 76-77, 387].

Since the evidence undeniably proved that the loans were made and that appellant procured them, there is no prejudice in inadvertently instructing the jury that the Government need not prove these facts.

Second, the erudite trial judge painstakenly instructed the jury as to the elements of the offense, including the element that the fee be for procuring a loan. The record discloses the following instructions:

> "Each count of the information before you was prepared, made and filed under Title 18, United States Code, Section 220. By that section, so far as it is material for your purposes, it is provided that:
>
> " 'Whoever, being an officer, or employee . . . of any bank, the deposits of which are insured by the Federal Deposit Insurance Corporation . . . except as provided by law, stipulates for or re-

ceives or consents or agrees to receive any fee, commission, gift, or thing of value, from any person, firm, or corporation, *for procuring or endeavoring to procure* for such person, firm, or corporation, or for any other person, firm, or corporation, from any such bank . . . *any loan* . . . by any such bank . . . shall be . . .' [Tr. 896] (Emphasis added.)

guilty of a criminal offense.

". . . the statute undertakes, by the imposition of criminal sanctions against it, to prevent an officer or employee of such bank from stipulating for, or receiving, or consenting or agreeing to receive any fee, commission, gift, or thing of value, from any person, firm or corporation, *for procuring or endeavoring to procure from such bank any loan for* such person, firm or corporation, or for any other person, firm, or corporation . . ." [T. R. 897] (Emphasis added.)

". . . What is vital and essential to guilt is that, in point of fact, the stipulation for, or receipt of, or consent or agreement to receive, any fee, commission, gift or thing of value from any person, firm or corporation actually be *for the procuring of, or the endeavoring to procure, a loan* from the bank either for such person, firm or corporation, or for any other person, firm or corporation . . ." [T. R. 898] (Emphasis added.)

". . . Rather, the plaintiff must prove beyond a reasonable doubt that the defendant stipulated for, or received, or consented or agreed to receive, such fee, or commission, or gift, or thing of value *for procuring or endeavoring to procure* from his em-

ployer bank a loan for such borrower." [T. R. 899].

". . . the essential elements of each such count which the plaintiff must prove beyond a reasonable doubt, before you may find the defendant guilty of the charge against him made in that count, may be summarized as follows:

* * * * * * * * *

"4. . . . That such stipulation for, or receipt, or consent or agreement of the defendant, if any, to receive such fee, commission, gift or thing of value was *in return for the defendant's procuring or endeavoring to procure a loan* from Bank of America . . ." [T. R. 899, 900]. (Emphasis added.)

". . . But, here again, the statute from which I have quoted does not require the proof of both the procurement and the endeavor to procure such loan as the purpose of the defendant's alleged acts but is satisfied by the proof of *either the procurement or the endeavor to procure such loan* as the purpose of the defendant's alleged acts." [T. R. 903] (Emphases added.)

Following these instructions, the Court then proceeds to instruct the jury upon the matter which appellant argues is erroneous. To be fair to the District Judge, appellee will set forth below the full and complete Instruction given the jury, because the portion thereof which appellant has selected to criticize should be taken in context:

"Let me explain to you another and somewhat related phase of the plaintiff's charges against the defendant. To do this, I shall have to be somewhat

repetitious. In each count of the information, the plaintiff charges and alleges that the defendant stipulated for, received, consented and agreed to receive, a designated sum of money as a fee, commission, gift and other thing of value for procuring and endeavoring to procure a designated loan from Bank of America National Trust and Savings Association. What the plaintiff must prove in that behalf is, as I have already declared to you, that the defendant stipulated for, or received, or consented to receive, or agreed to receive the designated sum of money as a fee, or a commission, or a gift, or another thing of value *for procuring or endeavoring to procure the loan described.* It is not essential to conviction that the plaintiff prove that the defendant did actually procure or endeavor to procure the loan described. Evidence that he did actually procure or endeavor to procure such loan, if and to the extent that you find such evidence to exist, may indeed be considered by you as reflective of the defendant's object and purpose in his acts, if and to the extent that you find he performed any acts. But the defendant is not in this case charged with, or being prosecuted for, the procurement of, or the attempt to procure, any loan from Bank of America National Trust and Savings Association." [T. R. 903-904]. (Emphasis added).

It is obvious that the jury cannot have been misled by the Instruction of which appellant belatedly complains. Complete instructions upon the elements of the offense were given and it was undisputed in the lengthy (fourteen days) trial that the loans were made by the Bank of

America. Therefore, assuming, *arguendo,* that the Instruction was erroneous, it was not prejudicial to the appellant, and Rule 30 precludes appellant from raising the matter.

Conclusion.

The judgment should be affirmed.

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